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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/622,803	07/21/2003	Rudolf Bertagnoli	P07878US00/MP	3480

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STITES & HARBISON PLLC (SYNTHESE)  
1199 NORTH FAIRFAX STREET  
SUITE 900  
ALEXANDRIA, VA 22314

EXAMINER
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SWIGER III, JAMES L

ART UNIT	PAPER NUMBER
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3775

MAIL DATE	DELIVERY MODE
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11/25/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/622,803	<b>Applicant(s)</b> BERTAGNOLI, RUDOLF	
	<b>Examiner</b> JAMES L. SWIGER III	<b>Art Unit</b> 3775	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 30 July 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-3,5-7,22,25,33 and 34 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3,5-7,22,25,33 and 34 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 05 January 2007 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Claim Objections***

Claim 5 is objected to because of the following informalities: It is suggested in line 5 to change "comprises" to --comprise-- as it appears to be referring to both arms. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 112***

Claim 5 rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

It is noted that applicant is claiming the "second articulating member." There is insufficient antecedent basis for this, as this is positively recited and there is no previous recitation of it in the claims. If applicant actually is referring to a "second articulated *part*" found in claim 1, then applicant should make the claim terminology consistent. A part of something may be considered differently that a separate "member" as applicant appears to be claiming.

Appropriate action is required.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Art Unit: 3775

Claims 1-3, 5-7, 22, 25 and 33-34 rejected under 35 U.S.C. 103(a) as being unpatentable over Bolger et al. (US Patent 6,770,096) and Wright (US Patent 5,846,193) and Cleveland, Jr. (US Patent 2,774,350).

Bolger et al. disclose an instrument for spreading at least two adjacent vertebrae (16) and/or retaining at least two adjacent vertebrae in a spaced apart condition, a frame member comprising at least two arms (see drawing below) each arm having a tube (see drawing below), a connecting member (see drawing below) which connects the arms for movement toward and away from each other and a plurality of anchor screws (see drawing below, and Figs. 10-12 and Fig. 13).

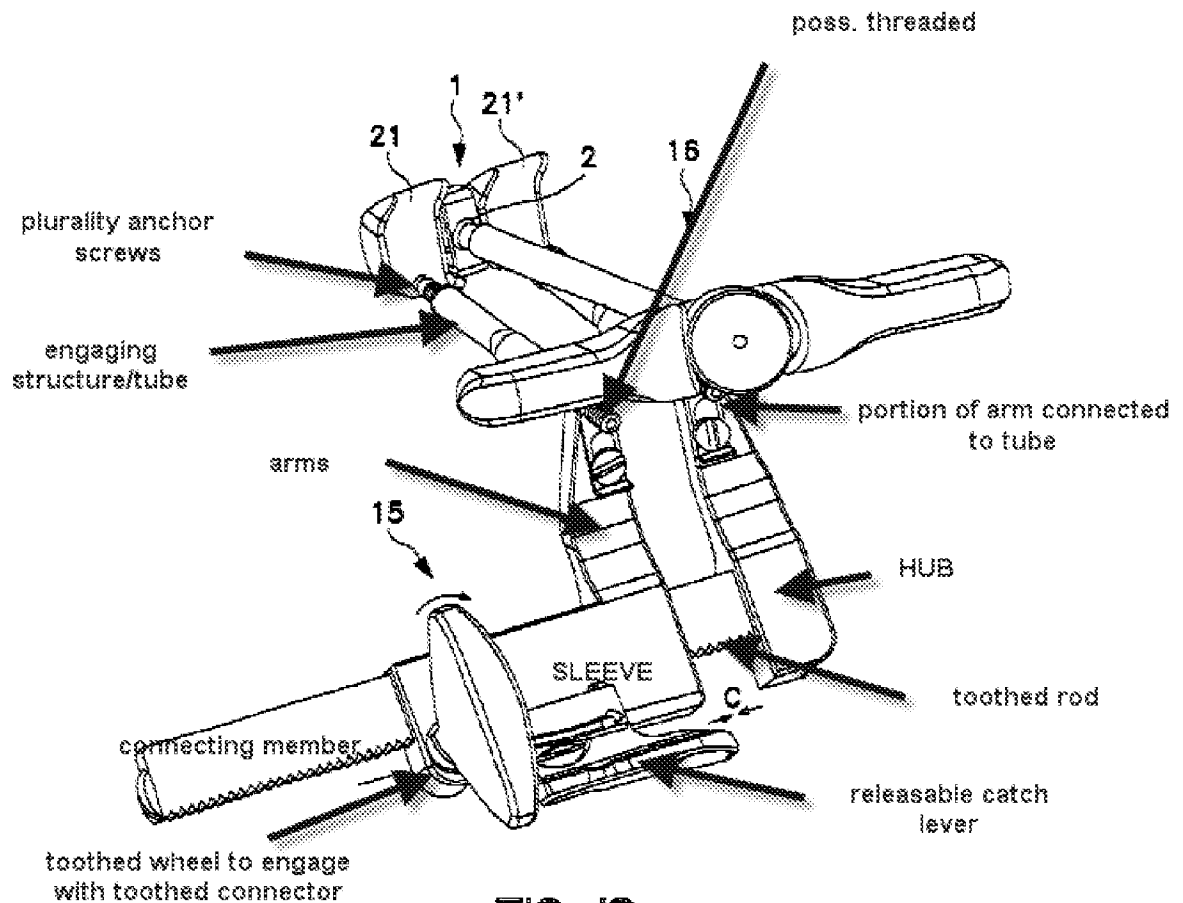


FIG. 12

Bolger et al. also disclose a connecting member with a toothed rod (see drawing above) a sleeve (see drawing above), a releasable catch lever (see drawing above), a hub that connects to the toothed rod (see drawing above), and a tube for accepting the plurality of anchor screws (see drawing above).

Bolger et al. disclose the claimed invention except for specifically a nut that attaches to a threaded end of the anchor screws to be a retaining structure. Cleveland,

Art Unit: 3775

Jr. discloses a spinal alignment device that has a rear end that is threaded and that has a retaining structure that attaches to this threaded portion for improved fixation and immobilization (see end at 34 with 18). These nuts help to hold the ends of the anchor screws in place. It is also noted that using threads or some kind of retaining structure for better fixation is, generally, well known in the art. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Bolger et al. having at least threaded ends of anchor screws that could then be further secured with a retaining structure that attaches to said threads in view of Cleveland, Jr. to have better stability during the use of the instrument for realigning vertebrae.

Bolger et al. disclose the claimed invention except for each arm having first and second articulated parts, connecting the tubes and connecting member for relative movement. Wright '193 disclose an apparatus for guiding surgical instruments during surgery having arms connected to a connecting member including a toothed rod that have first (24) and second (20) articulated parts (see also Fig. 1). Individually articulating sections allow the device to have optimal adjustability, as patient anatomy can vary as the device and bone screws are being installed. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Bolger et al. having at least articulating arms with at least first and second articulating parts to have optimal adjustability when installing the device.

***Response to Arguments***

Applicant's arguments with respect to claims 1-3, 5-7, 22, 25 and 33-34 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES L. SWIGER III whose telephone number is (571)272-5557. The examiner can normally be reached on Monday through Friday, 9:00am to 5:30pm.

Art Unit: 3775

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JAMES L SWIGER/  
Examiner, Art Unit 3775

/Eduardo C. Robert/  
Supervisory Patent Examiner, Art Unit 3733